A HISTORICAL SKETCH OF MOHAMMEDAN JURISPRUDENCE.

III. The "Jurists," the Modern Writers, and the British Indian Courts.

At the time of the Prophet's death, however, the claims of 'Alí according to accepted history were not openly put forward, and Abú Bakr was elected the first Caliph. He was the head of the State, and as Imám he led the Friday prayers. He was no doubt in his capacity of Caliph, the chief executive authority, but he had no sovereign power nor any royal prerogative. He was simply the principal magistrate to carry out the injunctions of the Qur'án, and the ordinances of the Prophet. He had no legislative functions, for God alone is the Legislator in Islam. The Mohammedan community was to be governed in the main on the principles already laid down for the purpose. Hence the necessity of collecting the verses of the Qur'án and the precepts and precedents of the Prophet forced itself upon the attention of the early Muslims.

The texts of the Qur'án during the lifetime of the Prophet had been preserved either in the memories of his Companions or inscribed on bones, date-leaves and tablets of stone. In an expedition against the impostor Musailimah, a large number of the reciters of the Qur'án (*Qurrá'*) were slain, and at the suggestion of Omar, Abú Bakr had the divine Book collected. Zaid, who used to be constantly with the Prophet and often acted as his amanuensis, was employed at this task which he accomplished between A. H. 11 and 14. But several different versions and readings of this edition soon crept into use, and Othmán, the third Caliph, perceiving the need for a correct version again utilized the services of Zaid in revising the first edition. On the revision being completed Othmán caused all the remaining editions to be destroyed, and it is due to this fact that at the present day only one authentic and uniform text is in use throughout the Moslem world.

The sayings and decisions of the Prophet were not, however, collected by the authority of the State as was done in the case of the Qur'án. What the reason was can only be conjectured. Their collection was left to the piety and private enterprise of

the Mohammedans. Men that were most learned in the traditions soon gathered round them an increasing band of students eager to learn and store up every saying of the Prophet, and it seems that this very zeal gave rise to many a false and inaccurate tradition; for Omar, during his Caliphate, discouraged and even stopped for some time the reporting of traditions. But his action had only a temporary effect and the study of traditions continued with the progress of time to be pursued with all the greater vigor. The traditionists, however, were not necessarily jurists. Among those who by their learning and aptitude in deducing rules of secular and canon law acquired eminence among the Companions of the Prophet, the names of 'Alí, Omar, Ibn 'Umar, Ibn Mas'úd and Ibn 'Abbás, stand out most prominent, and many important principles of Mohammedan jurisprudence are based on their opinion. Ibn Mas'úd for a long time gave lectures in Hadíth and law at Kúfah, while other jurists and traditionists carried on the work of teaching at Medina. These two places, especially the latter, continued for a long time to be the seats of sacred learning. Of Ibn Mas'ud's pupils the names of 'Alqamah and Aswad are the best known. On Ibn Mas'úd's death 'Alqamah occupied the professorial seat, and when the latter died he was succeeded by Aswad. On Aswad's death the mantle of the teacher fell on the shoulders of the famous Ibráhím an-Naka'í, who was known as "the jurist of 'Iráq." Ibráhím is reported to have made a collection of the principles of law that had been hitherto established, and Hammád, under whom Abú Hanífah afterwards studied jurisprudence, had a copy of this collection. The study of the traditions was the especial feature of the Medinite School, though it is not to be supposed that other jurists in any way overlooked or minimized the importance of this subject which is one of the two fundamental sources of law. A jurist must be learned in the traditions, though every traditionist was not a jurist. The mode of teaching the traditions was like this: The teacher or reciter used to call out from his seat, "It was related to me by so and so, to whom it was related by so and so * * * that the Prophet of God said this * * *." The students would then take down word for word the tradition as well as the chain of authorities with which it was prefaced. The statement of authorities was called Isnad, and as time receded from the age of the Prophet the chain of narrators consequently lengthened.

For some time after the death of the Prophet no Qádhí was appointed, and Abú Bakr himself had to administer justice as the

Prophet had done. But when the political affairs of the community increased and pressed upon his time, he delegated his judicial functions to Omar. Abú Bakr was the first to establish a prison-house for the malefactors. But it was during the Caliphate of Omar that the Qádhí was appointed, and he enforced the principle that the majesty of law was supreme, and the administration of justice must be above the suspicion of subservience to executive authority. He had once a law-suit against a Jew, and both of them went to the Qádhí who, however, on seeing the Caliph rose in his seat out of deference. Omar considered this to be such an unpardonable weakness on his part that he dismissed him from office. It does not appear that during Omar's time the power and jurisdiction of the Qádhí were properly defined or any distinct machinery provided for the execution of decrees and sentences. It is reported in history that a son of Omar was, during his Caliphate, proved guilty of drinking liquor, and he himself administered to him eighty stripes, the sentence prescribed by the law, in consequence of which the offender died. By the time of 'Alí the jurisdiction of the Qádhí and the legal procedure appear to have acquired a greater fixity and certainty. He once lost a coat of mail, and some time after, seeing it with a Jew recognized it as his own and took the Jew to the Qádhí. The Qádhí called upon 'Alí to produce evidence in support of his claim, but his only witness was his slave, and his testimony was not admissible in law. Thereupon the Jew took the oath that the coat of mail was his, and 'Alí's suit was dismissed. The Jew, however, was so much impressed by the humility of the Caliph and the independence of the Judge, that he is said to have repented and restored the coat to 'Alí, to whom it in fact belonged, and embraced Islam. 'Alí, the fourth Caliph, was assassinated in 40 A.H., and this brought to a close the age of "the rightly-guided Caliphs." This period, from the point of view of jurisprudence, was characterized by a close adherence to the spirit of the ordinances of Islam. Law was administered either by the head of the State and the Church or under his direct supervision. The limits of Islam expanded with growing rapidity, and it came into contact with the laws and customs of the different subject nations. The first four Caliphs were men of action and experience of the world, and jurisprudence in their hands, while it was not separated from religion, became imbued with principles of practical application.

The first act of the Omayyad dynasty, their successors, was to remove the seat of the Caliphate to Damascus outside the limits

of Arabia proper. The Caliphs were still at the head of the Church and the State, but they were not all Companions of the Prophet, nor noted for their knowledge of the sacred laws. A bright exception must be noted in the person of Omar Ibn 'Abdi-l-'Azíz who was remarkable not only for his rigid piety, but also for his extensive knowledge of the law and the traditions. There are many traditions which rest upon his authority. The Qádhí still administered justice during the reign of the Omayyads, but the study of jurisprudence was carried on in the lecture rooms of the professors, who did not come in contact with the practical concerns of the administration of justice. The zeal, however, for the study of law did not abate, and during the latter days of the Omayyads it was largely influenced at least in 'Iráq and Mesopotamia by the newly-introduced science of Divinity. Scholastic logic and grammar were also studied as sciences, and this recently-awakened scientific spirit produced its effect on the study of jurisprudence. The distinction of first classifying the law under different subjects and introducing the use of technical phraseology and arranging the different sources of law is ascribed to Wásil ibn 'Atá', the founder of the Mu'tazilah sect. But the work he did in this connection was but elementary.

With the fall of the house of the Omayyads and the accession of the Abbásides to power, in 132 A.H., a new impetus was given to the study of jurisprudence. The Abbáside Caliphs loved to patronise learning and extended special encouragement to the jurists. Soon Bagdad their capital became the center of culture and attracted jurists and traditionists from Hijáz, Syria, Mesopotamia and other parts of the empire. The Abbáside Caliphs appointed as Qáhdís men noted for their learning and legal acumen, and gave them handsome salaries and a high place of dignity in the State. During this period, there can be no doubt, the study of the Greek and perhaps Roman literatures and sciences came into vogue, and some writers, especially Mr. Sheldon Amos, have asserted that the Mohammedan Jurisprudence borrowed largely from Roman Law. Mr. Amos's inferences are mainly derived from certain features of resemblance which the one system bears to the other. But since the Mohammedan legists themselves make no allusion to the Roman Jurisprudence and their theories altogether exclude its recognition as a factor in molding the Mohammedan Law, no useful purpose can be served by pressing an inquiry of this nature.

Abú Hanífah an-Nu'mán ibn Thábit, commonly known as

Imám Abú Hanífah, was born in 80 A.H., during the time of the Omayyad Caliph 'Abdu-l-Malik and died at an advanced age, eighteen years after the 'Abbásides came to power. He first studied scholastic divinity, but soon abandoned it in favor of jurisprudence. He attended the lectures of Ja'far as-Sádiq and of Hammád the first of whom, a descendant of the Prophet, was noted for his great learning and piety and is regarded as an Imám of the Shí'ah School; and the latter, as already stated, was a disciple of Ibráhím an-Nakha'í and enjoyed high reputation as a jurist. The traditionists from whom he heard traditions were Ash-Sha'bí, Qatádah, Al-A'mash, and other men of eminence in that branch of learning. Abú Hanífah was endowed with talents of an exceptional nature and had the true lawyer's gift of detecting nice distinctions. He possessed remarkable powers of reasoning, which, combined with the resources of a retentive memory and a clear understanding, brought him into rapid prominence as a master of jurisprudence. Men flocked to his lectures, and among his pupils the names of Abú Yúsuf, Muhammad and Zufar are intimately connected with the science of Mohammedan Law. The teachings of Abú Hanífah acquired for him the title of "upholder of private judgment" and his School of Law was distinguished by that epithet. There can be no doubt that he was considered by his contemporaries to rely less upon the traditions in arriving at legal conclusions and more upon private opinion than the other jurists. About this time, however, the jurists were broadly divided into two classes; those of Hijáz or Arabia Proper who were called "the upholders of the traditions," and those of 'Iráq who were known as "upholders of private opinion." But, as has been pointed out, notably by the great historian Ibn Khaldún, the notion that Abú Hanífah lacked a sufficient knowledge of the traditions or that he did not regard them as a legitimate source of law is unfounded and due to misconception. He observes: "Some prejudiced men say that some of the Imáms (especially meaning Abú Hanífah) had a scanty knowledge of the traditions and that is the reason why they have reported so few of them. This cannot be true regarding the great Imáms because the law is based on the Qur'án and the Sunnah and it is a duty incumbent on them to seek out the traditions. But some among them accept only a small number of traditions because of the severity of the tests they apply."[1] In sifting the traditions Abú Hanífah was undoubtedly more strict than the others, and the tests

[1] Ibn Khaldún, Búláq edition, Vol. I, p. 371.

that he applied to them resulted in excluding many traditions which the people generally accepted as genuine. Further, the principles that he laid down confined within a narrow compass the traditions from which a rule of law might be legitimately deduced. It is said that he felt justified in acting upon eighteen traditions only out of the great mass that was then in vogue.

But his chief work lay in elaborating theories of jurisprudence. He was the first to formulate and to give prominence to the doctrine of Qiyás (analogical deduction) which, however, as a principle of law was undoubtedly in practical operation before his time. But he found that arguments based strictly upon analogy often led to hardships and anomalies, and in order to correct its effect in such cases he adopted a modifying principle called Istihsán (*lit*, Preference), which bears in many points remarkable resemblance to the doctrines of Equity. An example will best illustrate the respective operations of the doctrines of Qiyás and of Istihsán. A contract of the nature of sale according to the Mohammedan Law in order to be valid requires that the subject-matter must be in existence at the time of the contract. Arguing analogically, therefore, a contract with a manufacturer or artisan that he is to supply goods of a particular description for a specified price (paid to him) would be invalid. The principle of Istihsán, however, intervenes and establishes the legality of such a transaction on the ground of necessity based on the universal practice of mankind. Abú Hanífah also extended the doctrine of Ijmá' (consensus of opinion) beyond what many of his contemporaries were willing to concede. Some were of opinion that the validity of Ijmá' as a source of law should be confined to the Companions of the Prophet, and others would extend it to their successors but no further. Abú Hanífah affirmed its validity in every age. He also recognized the authority of local customs and usages ('Urf) as an independent source of law. It is laid down in Al-Ashbáh-wan-Nadhá'ír[1]: "Many decisions of law are based on usage or custom, so much so that it has been taken as a principle of law." The Qur'án and the precepts of the Prophet were with him as with all other jurists, the primary sources, Ijmá' coming next to them, and analogy, equity and local customs being regarded merely as secondary sources. In the work that Abú Hanífah did in the domain of Jurisprudence he was assisted by many able disciples, some of whom have already been mentioned. He also instituted a committee consisting of forty men from among his principal

[1] Lucknow edition, p. 116.

disciples for the codification of the laws. Of this committee Yahyá Ibn Abí Zá'idah, Hafs ibn Ghiyáth, Abú Yúsuf, Dá'úd at-Tá'í, Habbán and Mandal were men of great reputation as traditionists, Zufar was noted for his power of deducing rules of law and Qásim ibn Nu'aim and Muhammad were great Arabic Scholars. The committee used to discuss any practical or theoretical question that arose or suggested itself, and the conclusions which they agreed upon after a full and free debate were duly recorded. It took thirty years, it is said, for the code to be completed, but each part as it was finished was circulated broadcast. The entire code has now been lost, an irreparable loss to the cause of Mohammedan Jurisprudence. With the exception of his contributions to this code, it is doubtful whether Abú Hanífah wrote any other book, for Fiqhu-l-Akbar commonly attributed to him is not considered by the best-informed authorities to be his production. We have, however, a small collection of traditions based on his authority and called Musnadu-l-Imám Abi Hanífah, and a letter which he wrote for the instruction and guidance of his disciple Abú Yúsuf in his office of Qádhí is still in existence. Abú Yúsuf who for a long time acted as the Chief Qádhí of Bagdad wrote a treatise on the revenues. The book testifies to his great abilities, resources of learning and independence of thought. Muhammad the other well-known disciple of Abú Hanífah was a copious writer, but only some of his books are available, namely, Al-Muwatta', a collection of traditions arranged according to subjects, Al-Jámi'u-s-Saghír and Al-Jámi'u-l-Kabír. His other books Az-Ziyádát, Kitábu-l-Hujaj, Al-Mabsút, Kitábu-s-Siyari-l-Kabir and Kitábu-s-Siyari-s-Saghír are lost to us though frequent references are made to them in text-books and Fatáwas. Abú Hanífah never accepted the office of Qádhí, and Ibn Hubairah, the Governor of Kúfah, had him flogged because he refused to hold it. Al-Mansúr at last cast him into prison ostensibly for the same reason, and there the great jurist expired, having been, as believed, poisoned at the instance of Caliph. He was held in such esteem that his funeral prayers, it is reported, were said for ten days, and on each day about fifty thousand people attended. The Mohammedans of India, Afghanistan and Turkey are mostly Hanafís, and the followers of his school are also largely found in Egypt, Arabia, and China.

The age of Abú Hanífah was the age of Jurists. At Medina, the city where the Prophet fulfilled his mission and died, a great Imám arose in the person of Málik Ibn Anas. We have seen that

ever since the death of the Prophet that sacred city continued to be regarded as the home of traditionary learning. Málik was born there in 95 A.H., and there he studied and taught and did all his work. In his time he was looked up to as the highest authority in Hadíth, and his fame in this respect has not suffered by the lapse of ages. He was not only a traditionist but a jurist and he founded a school of law which exercised great influence in his lifetime. The Moors of Spain belonged to this school and it still counts numerous followers in Northern Africa. Muhammed, the disciple of Abú Hanífah, studied traditions under him for three years. His doctrines were not, however, essentially different from those of Abú Hanífah. Málik leaned more upon traditions and the usages of the Prophet and the precedents established by his Companions. He upheld the exercise of judgment when the other sources failed him. Being in a better position than Abú Hanífah to be acquainted with the laws as laid down by the Shábah (Companions) and their successors, he embodied them more largely in his system. He attached a preponderating weight to the usages and customs ('urf) of Medina, relying on the presumption that they must have been transmitted from the time of the Prophet. He established a principle corresponding to that of Abú Hanífah's Istihsán, but of greater freedom and certainty of operation, namely, that of public welfare or advantage (Istisláh) as a basis of private judgment (or Ra'y)[1]. Málik Ibn Anas died twenty-nine years after Abú Hanífah. Imám Málik's Al-Muwatta', a collection of traditions, is well known and contains about three hundred traditions.

Among Málik's pupils, Muhammad Ibn Idrís Ash-Sháfi'í attained even greater eminence as a Jurist than the master himself. He was born in Palestine in 150 A.H., and was of the same stock as the Prophet, being descended from 'Abdu-l-Muttabil, the grand-father of the Prophet. He attended lectures on law and traditions not only of Málik Ibn Anas but of other noted doctors in law including Muhammad, the disciple of Abú Hanífah. At an early age he evinced proofs of great talents, and while still a youth he was held competent to deliver lectures in jurisprudence. His fame spread far and wide and his doctrines found great vogue. The school of law with which his name is associated takes rank, in the number and importance of its followers, next only to the

[1] Adhudi's Commentary on the Mukhtasar of Ibn Hájib, and Al Mankhúl of Imám Muhammad al-Ghazzáli, MSS., Bohar Collection, Imperial Library.

Hanafíte school. In his attitude towards the traditions, Ash-Sháfi'í struck the *via media* between Málik and Abu Hanífah. He was more discriminating than Málik in accepting the traditions and less severe and fastidious than Abú Hanífah in this connection. He allowed greater scope and extension to Ijmá' (consensus of opinion) than even either of them, putting a liberal and workable interpretation on the well-known dictum of the Prophet "My people will never agree in an error." If a rule established by Ijmá', either in the form of usage or otherwise, contradicted a reputed tradition of the Prophet, he assumed the existence of a lost tradition which must have given rise to the usage. He accepted analogy as a legitimate basis of jurisprudence but rejected Málik's principle of public utility and Abú Hanífah's equity of the jurist[1]. In the exercise of analogy he required that the reason of the rule ('Illah) must be stated either in the text itself or is to be clearly inferred therefrom. Ash-Shafí'i was noted for his balance of judgment and moderation of views, and was the first to write a treatise on Usúl, or Principles. Egypt is the principal stronghold of his doctrines, but his followers are to be found in other parts of Africa, in Arabia and also some in India, specially in Bombay and Madras.

Among the scholars who attended Ash-Sháfi's lectures, Abú 'Abdi-llah Ahmad Ibn Hanbal, known as Imám Hanbal, took up a strong reactionary attitude and founded the fourth and the latest of the Sunní schools of Jurisprudence. He was born at Bagdad, A.H. 164 and studied under different masters including Sháfi'i. But from all the accounts that are left of him he appears to have been more learned in the traditions than in the science of law. As a traditionist and theologian his reputation stood very high, and in the number of traditions that he recollected no one approached him. In law he adhered rigidly to the traditions, a much larger number of which he felt himself at liberty to act upon than any other Doctor. His interpretation of them was liberal and unbending, and he allowed little if any force to the doctrines of agreement and analogy.[2] He was a man of great piety and uncompromising opinions, and was cruelly persecuted by the Caliph Al-Ma'mún, because he adhered to his own views on certain points of divinity and refused to conform to the doctrines that had found favor in Court. This unjust persecution served only to enhance the great reverence in which he was held by the people, and it is said that when he died in 241 A.H., 80,000

[1] Al-Mankhúl, pp. 213–215 and 229. [2] Al-Mankhúl, p. 189.

men and 60,000 women attended his funeral. His followers who were regarded as reactionary and troublesome were persecuted from time to time. Now his school consists only of a few followers and those only in certain parts of Arabia. He does not appear to have written any treatise on law and I have not been able to secure any book—I do not think any exists—which embodies his doctrines. All that one can learn of them is from allusions in historical and biographical works, and from occasional references in the law-books of other schools. His great work, a collection of 50,000 traditions reported by him and known as Masnadu-l-Imám Hanbal, has been printed in Egypt and forms a valuable addition to the literature on the subject. But one has only to glance at it to perceive that the book which is not even arranged according to the subjects lacks the scientific spirit.

The age of the four Imáms produced other teachers, who had for some time a considerable following of their own. Among them Sufyán ath-Thaurí and Dá'úd adh-Dháhirí (the Literalist) attained eminence as Jurists. But their systems are now extinct and do not call for any notice here. Similarly, having regard to the limitations of the subject, no account has been attempted here of the growth of the Sh'íah School of Law.

After the close of the third century of the Hijráh, however, there has been no one who has succeeded in obtaining recognition by the Mohammedan world as an independent thinker in the domain of Jurisprudence. The work that has been done since, has been to formulate and to apply the principles laid down by the founders of the Sunní and the Shíah schools. With the lapse of time the horizon of Mohammedan juridical thought has been closing in with stricter narrowness. A modern Mohammedan is limited in his exposition of the law not merely to the general principles enunciated by Abú Hanífah and the other Imáms, but according to the commonly received notion, to even the arguments and conclusions of such of their followers as are admitted to have attained a certain rank as Jurists. The Mohammedan law in theory is a completed science, and some go so far as to say that the ancient doctors of law have anticipated every question and laid down a rule for its solution. The more correct doctrine is, as we shall see, that the principles which they have laid down, would, if properly applied, furnish a clue to every legal problem. The doctors below the rank of the founders of the different schools have been assigned as it were their respective spheres of jurisdiction beyond which their opinions would be so to speak *ultra vires*.

The classification of the jurists runs thus:

(1) Mujtahidún (Doctors-in-law) of the first degree. These have an absolute and independent power of exposition of the law. They are not hampered by any rules or limitations in the interpretation of a text of the Qur'án, or in rejecting or accepting the genuineness of a tradition. They have uncontrolled discretion in formulating theories and laying down principles of jurisprudence. This high rank has in the Sunni Schools been conceded only to Imám Abú Hanífah, Málik, Sháfi'í and Hanbal.

(2) Majtahidún of the second degree. They were among the immediate disciples of those of the first degree. Abú Yúsuf, Muhammad, and Zufar, in the Hanafí school; Nawawi, Ibnu-s-Saláh and Suyúti in the Sháfi'í; and Ibn 'Abdi-l-Barr and Abú Bakr ibnu-l-A'rábí in the Málikí school. These Mujtahids were to follow the fundamental principles laid down by their masters, but they were not bound to follow them in their arguments or the mode of applying the principles.

(3) Mujtahidún of the third degree. Their function is to explain the principles by arguments and illustrations, and to apply them to particular cases. To this class belonged Nasafi.

The last rank of Mujtahids is again subdivided into several grades:

(*a*) Those who have the power of exercising their judgment according to the principles of their respective Schools, in questions upon which there is no opinion recorded of the jurists of a higher rank. To this rank among the Hanafis belonged Abú Bakr-al Khassáf, Taháwi Takhru-l-Islám Bazdoui and Qádhí Khán.

(*b*) Those that are permitted to draw legal inferences and conclusions from authorities of a higher degree, and explain and illustrate what has been left doubtful or general. Fakhru-d-Din ar-Rází was a jurist of this class.

(*c*) Those who are entitled merely to discriminate which of the two conflicting opinions held by jurists of a

higher rank is correct. Qudúrí and the author of Hidáyah belong to this class.

(*d*) Those who are competent to pass opinion as to which of the two conflicting views is stronger or weaker than the other. To this class belonged the authors of Durru-l-Mukhtár and Wiqáyah.

The above classification and limitations, however, apply only to those who profess to belong to a particular school of law.

The popular belief is that the list of jurisconsults of the first rank has been closed and no new teachers like Abú Hanifah, Sháfi'í, Malik, Hanbal, or even of the third rank like Nasafí will arise again. But Bahru l-'Ulúm, the eminent commentator of *Musallamu-th-Thubut*, referring to this notion, observes, "There are men who say that after Nasafí there can be no doctor of the third class, and that as to the first class it came to an end with the four Imáms, and consequently it lies with everyone to follow one of them. But all this is a mere fancy and they cannot support it by argument. These men do not know or mind what they say. To them applies the saying of the Prophet, 'They pass opinions without knowledge, and not only they themselves go wrong but lead others astray.'"

The Mohammedan jurisprudence as we have seen does not accept legislation by the State as a legitimate source of law. Nor does it admit the principle of judge-made law. The Qádhí's legal pronouncements were binding only for the decision of the particular case before him, but had no value as a precedent. His judgments were not even reported under the authority of the State. No doubt some books of Fátáwa like that of the celebrated Qádhi Khán contain dicta of distinguished judges, but these are stated merely as their opinions on abstract questions of law. The authority of a collection of this description is derived not from the judicial office of its author but from the position he occupied in the rank of jurists. If, therefore, we bear in our minds that in the Qur'án and the Hadith the enunciation of law is confined to a few general principles and elementary rules, it becomes obvious that the Mohammedan jurisprudence has been largely built up by means of juristic deductions. This result it may well be contended is entirely in harmony with the doctrine of Iimá' which, according to the accepted opinion, holds good in all ages. There has been, however, a tendency as already noticed, on the part of a few isolated theorists, afraid lest the progress of time might

introduce innovations to wrap away the Science of Mohammedan Law as it were in the shroud of the past by making a final and conclusive classification of the Mujtahids.

With the establishment of the British Indian Courts, the Mohammedan Jurisprudence has entered upon a new phase in India. In the early days of the British settlement the Mohammedan Code was enforced in all its departments, but in course of time the Mohammedan laws relating to crimes and punishments, revenues, land-tenures, procedure, evidence and partly transfer of property were gradually abandoned and substituted by the enactments of the Legislature. Questions relating to family relations and status, *viz.*, marriage, divorce, maintenance and guardianship of minors, succession and inheritance, dispositions of property by *hibah*, will or waqf, and in some part of India the right of pre-emption are still governed by the Mohammedan law so far as the Mohammedans are concerned.

The administration of the Hindu and the Mohammedan laws was for some time carried on with the help of Indian Jurists who acted as expert advisers to the Indian High Courts, the Mohammedan law officers being called Muftís and Moulvies and the Hindu law officers Pundits. But for a long time the employment of such experts, being considered undesirable and unnecessary, has been abandoned. In *Hori Dasi Dabi* v. *The Secretary of State for India*[1] it was observed by Mr. Justice Louis Jackson:

> "I confess it seems to me to be among the advantages for which the people of this country have in these days to be thankful that their legal controversies, the determination of their rights and their status have passed into the domain of lawyers, instead of pundits and casuists; and in my opinion the case before us may very well be decided on the authority of cases without following Sreenath, Achyatanand and others through the mazes of their speculations on the origin and theory of gift."

These remarks were appropriated by Mr. Justice Trevelyan to the consideration of an important question regarding the law of Waqfs which arose in the Full Bench case of *Bikani Miah* v. *Sukhlal Poddar*.[2] Whatever might have been the demerits of the condemned system, it should in fairness be admitted that the *futwas* of the Moulvies, so far as they can be found in the pages of the Law Reports, formed a faithful exposition of the Mohammedan law on the points covered by them.

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[1] I. L. R., 5 Calc., 228.
[2] I. L. R., 20 Calc. 116.

When the services of the law officers were dispensed with, the Courts had to rely for information on question of Mohammedan law on the few reported *futwas*, Hamilton's translation of the Hidáyah, Macnaughten's Principles and Precedents of Mohammedan Law and Baillie's Digest. Hidáyah is a work of great and indisputable authority on the Hanaffi law, but it would be a gross error to regard it as an exhaustive Code. It deals principally with controversial questions in which the Imáms differed and the learned author seldom tells us in so many words which of the different views he considers to be correct. The style of the book is highly terse, and in his discussions the author presumes in his readers an intimate acquaintance with the Qur'án and the Hadíth, the principles of Mohammedan Jurisprudence and indeed the whole range of civil and canon law. Mr. Hamilton's translation is not of the original Arabic text, but of a Persian version especially prepared for him by some Moulvies who introduced many arguments and explanations of their own in order to enable the translator to accomplish his task.[1] And unfortunately Mr. Hamilton has made no attempt to distinguish the original text from the interpolations of the Moulvies. Mr. Macnaughten's book furnishes information on only a few elementary matters. Mr. Baillie's Digest, which is a more useful book for the purposes of practical guidance, is a translation of selected portions of Futáwá Alamgírí, the famous Code of Mohammedan law compiled by eminent jurists of India at the instance of the Emperor Aurangzeb. The more recent writings on the subject are Rumsey's, Mohammedan Law of Inheritance, Babu Shyama Charan Sircar's Tagore Lectures, Mr. Syed Ameer Ali's Mohammedan Law, Sir Roland Wilson's Digest of Anglo-Mohammedan Law, Moulvi Muhammad Yusuff's Mohammedan Law relating to marriage and divorce. Of these Mr. Ameer Ali's book alone enters upon a systematic discussion of the entire subject on the basis of original authorities. Besides these English books, translations of texts from well-known text-books, commentaries and Futwas in Arabic and Persian are often cited in the Courts when any important question of law requires elucidation. But once the British Indian Courts in adjudicating upon questions raised before them have ascertained from the available materials, the Mohammedan Law applicable to the subject, these decisions themselves according to the principles of British Jurisprudence, form henceforth a fresh basis and starting-point. If a rule of Mohammedan Law is laid down by a judgment of the

[1] See also Morley's Administration of Justice in India, page 289.

Privy Council or has been settled by an uniform course of decisions of the Indian High Courts, it must be accepted even though it may not agree with a proper reading of the original authorities.

The Judicial Committee of the Privy Council have recently delivered themselves of important dicta regarding the principles that should govern the administration of Mohammedan law, the effect of which may be far-reaching. In the case of *Abul Fatah Muhammad Ishaq* v. *Rosomoy Dhur Chowdhury*[1] their Lordships, referring to some precepts of the Prophet which had been quoted as an authority for the validity of a Waqf for the benefit of the grantor's family, express condemnation of "the absolute and extravagant application of precepts taken from the mouth of the Prophet." In that case the proposition, the soundness of which their Lordships refused to admit, was founded not only upon deductions made by the unanimous voice of eminent jurists of high authority strictly in accordance with the rules of Mohammedan Jurisprudence, but upon a consensus of opinion (Ijma') among the Companions of the Prophet, which in itself is an independent source of law. In a later case of *Baqar Ali Khan* v. *Anjaman Ara Begum*[2] their Lordships, referring to their previous decision, observe:

"In the judgment of this Committee delivered by Lord Hobhouse the danger was pointed out of relying upon ancient texts of the Mohammedan Law and even precepts of the Prophet himself, of taking them literally and deducing from them new rules of law especially when such proposed rules do not conduce to substantial justice. That danger is equally great whether reliance be placed upon fresh texts newly brought to light or upon fresh logical inferences newly drawn from old and undisputed texts. Their Lordships think it would be extremely dangerous to accept as a general principle that new rules of law are to be introduced because they seem to lawyers of the present day to follow logically from ancient texts however authoritative, when the ancient doctors of the law have not themselves drawn those conclusions."

In *Aga Mohammed* v. *Koolsom Bibee*,[3] their Lordships say,

"They do not care to speculate on the mode in which the text quoted from the Koran which is to be found in Sura. II. v. 241, 242, is to be reconciled with the law as laid down in the Hedaya and by the author of the passage quoted from Baillie's Imamia. But it would be wrong for the Court on a point of this kind to put their own construction on the Koran in opposition to the express ruling of commentators of such great antiquity and high authority."

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[1] I. L. R. 22 Calc., 619, p. 632.
[2] I. L. R. 25 All., 236, p. 254.
[3] I. L. R. 25 Calc. 9.

Reading the above decisions together, the following propositions may be deduced: A rule of Mohammedan Law enunciated by the ancient doctors is to be accepted certainly if it leads to substantial justice, and probably even if it does not. It is not permissible to the British Indian Courts to put their own construction on a text of the Qur'án contrary to that of commentators of great antiquity and high authority. If a proposition of law rests on the authority of jurists other than of the class indicated and does not conduce to substantial justice, the original text on which the proposition is founded should be examined to see if it properly bears the interpretation placed on it. Whether the test to be applied in such an event should be according to the principles of Mohammedan Jurisprudence or not, has not been explicitly laid down. Nor are we told to what age and rank a Mohammedan jurist must belong in order to possess the authority of an "ancient doctor of law." Can it be supposed that their Lordships had in their minds the classification of Mujtahids set forth above? The author of Hidáyah and probably some of the jurists quoted in Baillie's Digest will be accepted as belonging to that class, but whether the writings of other jurists equally eminent and universally known and regarded as authoritative, such as Qádhi Khán, the authors of Durru-l-Mukhtár, Bahru-r-Rá'iq, Raddu-l-Múhtár, and others would be ignored as "fresh texts newly brought to light" is a question of serious import in the administration of Mohammedan law. Hidáyah does not provide an answer for all the questions of Mohammedan law, and it could hardly have been meant that any point not covered by an express dictum in that book is to be decided on considerations of "substantial justice," although the law on the subject may have been explicitly laid down by other authorities. Again, how is the question of "substantial justice" to be determined? In the case of *Abul Fatah Mahommed* analogical arguments based on the principles of Mohammedan law relating to a cognate subject were relied upon. A question would then arise for solution how far the rules laid down by the jurists for the exercise of Qiyás (analogical deductions) should be followed.

If, however, the pronouncements of their Lordships read as a whole tend to this, that in order to determine the rank and number of those Mohammedan legal authorities that fall within the category of the "ancient doctors of law" no inquiry is to be made as to who are the jurists whose writings are generally accepted and acted upon as authoritative by the Mohammedans themselves, that the question whether a rule of Mohammedan law promotes

the cause of "substantial justice" is to be decided without reference to the policy and principles of Mohammedan Jurisprudence; and further that whenever the Courts view with disfavor a legal proposition not covered by any express dictum of "the ancient doctors," they should be at liberty to construe the texts of the Qur'án and of the Hadith without regard to the rules laid down for that purpose, then, it is submitted, elements of great uncertainty have been introduced in the administration of Mohammedan law and a prospect is opened for innovations in the doctrines of Mohammedan Jurisprudence more essential than even the differences between the Sunni and the Shí'ah Schools. Perhaps the observations of the Judicial Committee were not intended to contain a statement of principles of such wide and general application and possibly on some future occasion the position may be made clear and all doubts set at rest.

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